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RECENT DECISIONS.

ALEXANDER B. SIEGEL, *Editor-in-Charge.*

ADMIRALTY—JURISDICTION—MARITIME CONTRACT—CHARTER PARTY.—The libelant as broker for the respondent, executed a charter party in his own name. As a result of the respondent's breach of the contract, the libelant was compelled to pay damages, which he sought to recover by subrogation to the rights of the other party. *Held,* since the libel was founded on the charter party, admiralty had jurisdiction. *Adler* v. *Galbraith, Bacon & Co.* (1907) 156 Fed. 259.

Until modified recently by statute, 3 and 4 Vict. c. 65; 9 and 10 Vict. c. 99, the English admiralty refused jurisdiction over contracts unless made, and to be executed, upon the sea, bottomry bonds and seamen's wages alone being excepted. Benedict, Admiralty, 3rd Ed. § 111; *Ins. Co.* v. *Dunham* (1870) 11 Wall. 1. This restricted construction resulting from the illiberal policy of the common law courts, *DeLovio* v. *Boit* (1815) 2 Gall. 398, has not prevailed in the United States, where not locality, but the nature and the subject matter of the contract, i. e., whether it has reference to a maritime transaction, is made the controlling criterion. *The Richard Winslow* (1896) 71 Fed. 426; *Ins. Co.* v. *Dunham, supra.* A logical construction of this test would give admiralty jurisdiction over charter parties, *Morewood* v. *Enequist* (1859) 23 How. U. S. 491, while denying it in the case of brokerage. *The Humboldt* (1898) 86 Fed. 351; *Richard* v. *Hogarth* (1899) 94 Fed. 684, the former being clearly maritime, while the latter is merely a preliminary contract leading eventually to the formation of one of a maritime nature. The principal case recognizes this distinction and correctly regards the novel facts as constituting an action based on a charter party.

ADMIRALTY—TORTS RESULTING IN DEATH—STATE STATUTES.—Two vessels, registered in Delaware, and owned by Delaware corporations, collided on the high seas and the plaintiff's intestate was killed. Negligence was found. *Held,* the Delaware statute providing for an action resulting in death would be applied in admiralty. *Old Dominion S. S. Co.* v. *Gilmore,* U. S. Supreme Court, December 23, 1907.

The principles applying to this case, now adopted by the Supreme Court, are developed in a note in 5 COLUMBIA LAW REVIEW 234.

CARRIERS—INJURY TO PASSENGER—INDEPENDENT CONTRACTOR.—A railroad employed an independent contractor to clean its cars. While being hauled away by the contractor, a car broke loose and collided with the car in which the plaintiff was riding and injured him. *Held,* the railroad was not liable for the negligence of the contractor. *Beckman* v. *Meadville etc. Ry. Co.* (Pa. 1907) 67 Atl. 983.

No duties involved in the safe transportation of passengers may be delegated to an independent agent so as to relieve the carrier from liability, *Barrow* v. *Kane* (1898) 88 Fed. 197; *Carrico* v. *W. Va. etc. Ry.* (1894) 39 W. Va. 86; *Chicago etc. Ry. Co.* v. *Rhodes* (1904) 35 Tex. Civ. App. 432, nor can it, by delegation to an independent contractor, escape liability to other persons while engaged in the performance of a statutory duty, *Railroad Co.* v. *Heflin* (1872) 65 Ill. 366; *Hole* v. *Sittingbourne etc. Ry.* (1861) 6 Hurl. & N. 488, nor where its work involves obstruction of the public highway. *T. B. & H. Ry. Co.* v. *Warner* (1895) 88 Tex. 642; *Chicago Bridge Co.* v. *La Manita* (1904) 112 Ill. App. 43. In Illinois the question depends on whether the work is part of the chartered powers. *Boyd* v. *Chicago etc. Ry.* (1905) 217 Ill. 332. Otherwise, however, a common carrier is not liable for the acts of its independent contractor to any greater extent than an individual. *Eaton* v. *Railroad* (1871) 59 Me. 520;

City Ry. Co. v. *Moores* (1895) 80 Md. 348. Since the cleaning of its cars was a separate and distinct function and in no way affected the safe carriage of passengers, there seems to be no good reason why a carrier cannot delegate such work to an independent contractor so as to escape liability for his negligence.

CONFLICT OF LAWS—NEGOTIABLE PAPER—NECESSITY OF PROTEST.—A foreign bill of exchange was endorsed by the drawers to bankers in New York who sent it to their agent in Vienna for collection. The agent failed to protest the bill on the refusal of the drawees to pay, or to give notice to the drawers as required by the laws of New York. *Held*, the drawers were discharged, though under the laws of Austria no protest was necessary. *Amsinck* v. *Rogers* (N. Y. 1907) 82 N. E. 134. See NOTES, p. 135.

CONSTITUTIONAL LAW—DENIAL OF PRIVILEGE—DENIAL OF WRONGFUL DEATH ACTION.—The widow of a citizen of Pennsylvania sued in Ohio on the right of action given by Pennsylvania for the death of her husband. A statute of Ohio gave its courts jurisdiction in such actions only when the death was that of a citizen of Ohio. *Held*, that the statute did not accord to citizens of Ohio any privilege denied to citizens of other states. *Chambers* v. *Baltimore & Ohio R. R.* (U. S. 1907) 28 Sup. Ct. 34. See NOTES, p. 132.

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT—EXCLUSION OF FOREIGN CORPORATION.—Under an act according to foreign corporations complying with certain conditions the privilege of doing business within the state, subject only to the requirements imposed upon domestic corporations, the defendant extended its line through the state and acquired valuable property therein. Subsequently a statute was enacted providing that any foreign corporation which should remove a suit from a state into a federal court should thereby forfeit the right to do business within the state. *Held*, as applied to the defendant, the statute was unconstitutional. *Chicago, R. I. & Pac. Ry. Co.* v. *Ludwig* (C. C. Ala. 1907) 156 Fed. 152.

The power to impose conditions upon the right of a foreign corporation to enter, *Bank of Augusta* v. *Earle* (1839) 13 Pet. 519; *Paul* v. *Virginia* (1868) 8 Wall. 168, or continue to do business within a state, *Sandel* v. *Atl. Life Ins. Co.* (1898) 53 S. C. 241, extends even to conditions in themselves unconstitutional. *Sec. Mut. Life Ins. Co.* v. *Pewitt* (1905) 202 U. S. 246; *Doyle* v. *Cont. Ins. Co.* (1876) 94 U. S. 535. See 5 COLUMBIA LAW REVIEW 231. But in some cases a contract is found between the state and the corporation defining the terms of admission, in which case no further condition may be imposed, *Brit. Am. Mort. Co.* v. *Jones* (S. C. 1897) 56 S. E. 983; *Com.* v. *Mobile & O. R. R. Co.* (Ky. 1901) 64 S. W. 451, except reasonable requirements under the police power. *Erie R. R. Co.* v. *Pennsylvania* (1894) 153 U. S. 628, 644. The payment of a license fee will constitute a consideration for the contract, *Am. Smelt. Co.* v. *Colorado* (1907) 204 U. S. 103; *Brit. Am. Mort. Co.* v. *Jones, supra*, or, as in the principal case, expenditure in reliance on the authorization given by the state. *Com.* v. *Mobile & O. R. R. Co., supra.*

CONSTITUTIONAL LAW—RESERVED RIGHT TO AMEND—WEEKLY PAYMENT ACTS.—An act of the legislature required mining, manufacturing, mercantile, telegraph, telephone and transportation corporations and incorporated express, water and electric light and power companies, to pay their employees weekly and in lawful money. *Held*, it was constitutional. *Lawrence* v. *Rutland R. Co.* (Vt. 1907) 67 Atl. 1091.

While laws fixing the time for payment of employees stand upon the same basis as those dealing with the medium of payment, see 7 COLUMBIA LAW REVIEW 617, and are unjustifiable under the police power, *Republic Iron and Steel Co.* v. *State* (1903) 160 Ind. 379, the theory of the principal case, sustaining both as to corporations under the reserved power to amend corporate charters, is within the rulings of both federal, *St. Louis etc. Ry.*

Co. v. *Paul* (1899) 173 U. S. 404; *Skinner* v. *Garnet Gold Mining Co.* (1899) 96 Fed. 735, and state courts. *Shaffer* v. *Union etc. Co.* (1880) 55 Md. 74; *State* v. *Browne & Sharpe Mfg. Co.* (1892) 18 R. I. 16; *Leep* v. *Ry. Co.* (1894) 58 Ark. 47; contra, *Johnson* v. *Goodyear Mining Co.* (1899) 127 Cal. 4. The Illinois decisions rest upon a specific constitutional provision. *Braceville Coal Co.* v. *People* (1893) 147 Ill. 66. Since the statute in the principal case applies to substantially all corporations it cannot be deemed an arbitrary exercise of the reserved power, cf. *Leep* v. *St. Louis etc. Ry. Co., supra;* contra, *Braceville Coal Co.* v. *People, supra,* and consequently does not deny to the defendant the equal protection of the laws. *Stearns* v. *Minnesota* (1900) 179 U. S. 223, 259.

CONTRACTS—RESCISSION FOR FRAUD—INSURANCE.—The plaintiff sued for the rescission of an insurance contract for fraud by the insurer at its inception. *Held,* upon a cancellation of the policy he could recover all the premiums paid with interest without any deduction for the risk carried. *Moore* v. *Mut. Reserve Fund Life Association* (1907) 106 N. Y. Supp. 255. See NOTES, p. 123.

CORPORATIONS—AMENDMENT OF CHARTER—RATIFICATION OF ULTRA VIRES CONTRACT.—A benefit insurance company issued a policy to the plaintiff which was ultra vires of the company. The plaintiff paid the premiums for a number of years. The company was then reorganized with power to issue such policies, and the prior act ratified. *Held,* the previous want of power was cured. *Wineland* v. *Knights of Maccabees* (Mich. 1907) 112 N. W. 696.

On the theory that an ultra vires act is void, *Cent. Trans. Co.* v. *Pullman's P. Car Co.* (1891) 139 U. S. 24, there could, of course, be no ratification; *Tullock* v. *Webster County* (1895) 46 Neb. 211; *Downing* v. *Mt. Wash. Road Co.* (1860) 40 N. H. 230; and the amendment with subsequent action would have to be construed as evidence of a new agreement. Cf. *McCracken* v. *San Francisco* (1860) 16 Cal. 591. If the theory be adopted that the right to plead ultra vires rests with the corporation as trustee for its stockholders, 7 COLUMBIA LAW REVIEW 196, the acceptance of the amended charter might be considered as a waiver of any objections on their part to a contract previously made coming within the new terms, and extending into the future. By this view, however, as applied in New York, *Bath Gas Light Co.* v. *Claffy* (1896) 151 N. Y. 24, and New Jersey, *Camden Ry. Co.* v. *Mays Landing Ry. Co.* (1886) 48 N. J. L. 530, they would also be estopped in the principal case because the corporation had received the full benefit of the contract. Cf. 7 COLUMBIA LAW REVIEW 428.

CORPORATIONS—PURCHASE OF STOCK IN SIMILAR CORPORATIONS—MONOPOLY.—Suit was brought to dissolve a gas manufacturing corporation, alleging abuse of its corporate privileges in creating a monopoly by the purchase of stock in similar corporations. *Held,* that under the New York law a monopoly so created was legal. *In re Consolidated Gas Co.* (1907) 106 N. Y. Supp. 407.

An injunction was asked prohibiting the transfer of stock of certain city railroads to a corporation organized to purchase such stock. *Held,* that the New York law prohibited a corporation from purchasing the stock of other corporations to the extent of creating a monopoly. *Burrows* v. *Interborough-Metropolitan Co.* (C. C. S. D. N. Y. 1907) 156 Fed. 389.

When the purchasing corporation is formed to effect a consolidation of existing corporations, a monopoly so formed is generally declared illegal. *Atty. Genl.* v. *Booth & Co.* (1906) 143 Mich. 80; *Northern Sec. Co.* v. *U. S.* (1904) 193 U. S. 197; *People* v. *Chicago Gas Trust Co.* (1889) 130 Ill. 268. Monopolies formed by purchasing stock of corporations engaged in the same business are open to the same objections, and have also been declared illegal. *Cent. Ry.* v. *Collins* (1869) 40 Ga. 582; *Langdon* v. *Branch* (1888) 37 Fed. 449. But the *Consolidated Gas Co.* case evades this rule by construing the power to purchase stock in similar corporations, given by the Stock Corporation Law, Laws of N. Y. 1892, c. 688 § 40, as unlimited by the Anti-

Monopoly Law, Laws N. Y. 1896, c. 383. The case relied upon, *Rafferty* v. *Buffalo City Gas Co.* (N. Y. 1899) 37 App. Div. 618, did not involve the creation of a monopoly. The *Interborough-Metropolitan* case considers the power given in § 40 of the Stock Corporation Law, *supra,* as limited by § 7 of the same act, prohibiting the carrying of such purchases to the extent of creating a monopoly. *People ex rel. Am. Ice Co.* v. *Nussbaum* (N. Y. 1900) 32 Misc. 112, construes the Anti-Monopoly Law, *supra,* as having the same effect. These constructions seem the more reasonable. While, as pointed out in the *Consolidated Gas Co.* case, the state may control the service given by public service corporations, and the prices charged, Laws of N. Y. 1905, c. 737 § 11; Laws of N. Y. 1907, c. 429 §§ 26, 49, 72, so that some of the objections to monopolies do not apply to them, yet the enactments make no exception in their favor.

CRIMINAL LAW—HOMICIDE—PRINCIPAL.—The defendant and another pursued the deceased, and jumped on him together, each stabbing him. No evidence of prior conspiracy was present. *Held,* since both were present, assisting in and assenting to the crime, it was not necessary to a conviction to show that death ensued from the particular acts of the defendant. *McCoy* v. *State* (Miss. 1907) 44 So. 814.

Where several conspire to effect death, each engaged in the common undertaking is a principal and is criminally responsible, regardless of whose act resulted in the homicide. Whether the offense be murder or manslaughter is immaterial. *Martin* v. *State* (1889) 89 Ala. 115; *Ruloff* v. *People* (1871) 45 N. Y. 213; 2 Hawk., P. C., Ch. 29, sec. 8. *A fortiori,* also, where there is simply nothing in the evidence to show who struck the fatal blow. *Green* v. *State* (1889) 51 Ark. 189; *People* v. *Flanigan* (1903) 174 N. Y. 356. Similar conclusions follow where, though there was no previous conspiracy, the defendant was present, assenting, aiding, and participating in the offense. *State* v. *Hermann* (1893) 117 Mo. 629; *Regina* v. *Price* (1858) 8 Cox C. C. 96. In most but not necessarily in all cases of this kind, there is evidence of a conspiracy entered into on the exigency of the occasion. *State* v. *Penney, supra; People* v. *Wilson* (1895) 145 N. Y. 628, 632. Of course, no liability attaches if the homicide results from the unconnected acts of a third party, neither participated in, nor assented to, by the defendant. *Woolweaver* v. *State* (1893) 50 Oh. St. 277; *People* v. *Woody* (1873) 45 Cal. 289.

DAMAGES—EXEMPLARY DAMAGES—NO ACTUAL DAMAGES.—The defendant maliciously instituted an action against the plaintiff in a foreign jurisdiction. A suit for an injunction and damages was brought. *Held,* in the absence of actual damage, no exemplary damages would be awarded. *Lightfoot* v. *Murphy* (Tex. 1907) 104 S. W. 511.

Exemplary damages are given as compensation by way of atonement for the infringement of a private right, as the contempt with which it has been treated increases the injury by rendering the right less inviolate. 7 COLUMBIA LAW REVIEW 122. Some courts, however, allow them rather as an example to deter others; *Brown* v. *Swineford* (1878) 44 Wis. 282; or on the ground of punishment. *Craven* v. *Bloomingdale* (1902) 171 N. Y. 439. According to either theory, exemplary damages should be allowed under proper circumstances for the infringement of a right which would ordinarily call for nominal damages only. *Ala. G. So. R. R. Co.* v. *Sellers* (1890) 93 Ala. 9; *Press Pub. Co.* v. *Monroe* (1896) 73 Fed. 106; *Beaudrot* v. *Ry. Co.* (1903) 69 S. C. 160. In Illinois, where the rule of the principal case is followed, actual damages are implied, if the violation of the plaintiff's right was malicious. *Blanchard* v. *Burbank* (1885) 16 Ill. App. 375. The result in the principal case may, however, be supported in that the action was in the nature of malicious prosecution to which actual damage is a necessary element. *Savill* v. *Roberts* (1698) 12 Mod. 208.

DOMESTIC RELATIONS—ANTE-NUPTIAL SETTLEMENTS—FAILURE OF CONSIDERATION.—An intended wife by an ante-nuptial contract relinquished all her

rights as heir or otherwise in the property of her intended husband. He failed to perform as to material covenants. *Held*, that she may claim her rights as heir. *In re Warner's Estate* (Cal. 1907) 92 Pac. 191.

At common law ante-nuptial agreements, except for a jointure under St. 27 Henry VIII, c. 10, were unenforcible; see 7 COLUMBIA LAW REVIEW 203; since they could not act as a release, dealing with non-existent rights, *Mann* v. *Mann's Estate* (1880) 53 Vt. 48, nor, being executory, as an estoppel. *Gibson* v. *Gibson* (1818) 15 Mass. 106. Always enforcible in equity, *Andrews* v. *Andrews* (1830) 8 Conn. 79, they are now, because of the dissolution of the marriage entity by statute, enforcible also at law, *Wentworth* v. *Wentworth* (1879) 69 Me. 247, subject to a very rigid scrutiny as to fairness. *Pierce* v. *Pierce* (1877) 71 N. Y. 154; *Kline* v. *Kline* (1868) 57 Pa. St. 120. In some states certain statutory provisions aimed to protect the widow and offspring cannot be barred; e. g. temporary support, *Building* v. *Durfee* (1891) 85 Mich. 34, and the widow's reward; *Phelps* v. *Phelps* (1874) 72 Ill. 545; while others, e. g. homestead rights, *Warner* v. *Warner* (1904) 144 Cal. 615, are barred only by express words. If there is a failure to perform in material covenants, the contract cannot be set up as a bar. *Hastings* v. *Dickinson* (1810) 7 Mass. 153; *Brenner* v. *Gauch's Exr.* (1877) 85 Ill. 368. The principal case seems sound and is in accord with authority.

EMINENT DOMAIN—IMPROVEMENTS BY CONDEMNOR.—The owner of land without objection, permitted the erection of a public schoolhouse. *Held*, in condemnation proceedings, the value of the improvements could not be included in the recovery. *McLaurin* v. *Jefferson School P. P.* (Ind. 1907) 82 N. E. 73.

The rule that one placing improvements on another's land loses their value is applied to condemnors acting ultra vires. *Price* v. *Weehawken Ferry Co.* (1879) 31 N. J. Eq. 31. An exception is made where the entry is effected with power and intention to condemn but neglecting some statutory provision; in which event the landowner need not be compensated for the improvements. *Justice* v. *Nesquehong Valley R. R.* (1878) 87 Pa. St. 28; *Newgass* v. *Ry. Co.* (1891) 54 Ark. 140; contra *Village of St. Johns* v. *Smith* (1906) 184 N. Y. 346. Courts frequently dispose of these cases on doctrines of implied assent. *Goodwin* v. *Canal Co.* (1868) 18 Oh. St. 169; *Dietrich* v. *Murdock* (1868) 42 Mo. 279; *Jones* v. *New Orleans Ry.* (1881) 70 Ala. 227. Other courts have held similarly because the presumption of the dedication of the improvements to the landowner is rebutted by the quasi-public nature of the trespasser's power to condemn. *Louisville R. R.* v. *Dickson* (1885) 63 Miss. 380; *Jacksonville-Tampa R. R.* v. *Adams* (1891) 28 Fla. 631; *Justice* v. *Nesquehong Valley R. R., supra.* The logical view advanced is that condemnation actions are special proceedings to which the rules of common law are not applicable, Lewis, Em. Domain § 507, and in which the aim of the court is to give compensation, which is just, *Searl* v. *School District* (1890) 133 U. S. 553; *Greve* v. *1st Div. of R. R.* (1879) 26 Minn. 66, so that the landowner is recompensed only for damages he has in fact sustained. *Jacksonville Ry.* v. *Adams, supra*, 638; *Aldridge* v. *Board of Educ.* (1905) 15 Okl. 354, 358. The cases contra ignore the peculiar nature of condemnation proceedings and apply strictly the rule as to tort feasor's erections.

EVIDENCE—ADMISSIONS—TESTIMONY IN A FORMER ACTION OR PROCEEDING.—The testimony of the vice-president and southern manager of the defendant corporation had been taken in another case by interrogatories. These interrogatories and answers were offered by the plaintiffs to show admissions of material facts. *Held*, that they were inadmissible on the grounds that the agents had no authority to make the admissions for the principal, and that there was no express or implied adoption of them by the defendant. *Sizer & Co.* v. *Melton & Sons* (Ga. 1907) 58 S. E. 1055. See NOTES, p. 131.

EVIDENCE.—EMINENT DOMAIN—DAMAGES.—A strip was condemned dividing the appellant's tract into two parcels, one of which was occupied by its

factory, and the other, vacant. Plans were introduced in evidence to show the necessity of the factory's expansion across the condemned strip to the vacant parcel. On cross-examination of the appellant's president it was brought out that for several months it had been financially embarrassed. *Held*, the cross-examination should go to the jury on the question of damages. *Bradley Mfg. Co.* v. *Chicago etc. Tract. Co.* (Ill. 1907) 82 N. E. 210.

The measure of damages is the market value of the land taken, in view of the uses for which it is available; *Miss. R. Bridge Co.* v. *Ring* (1874) 58 Mo. 491; circumstances being admissible to show long use by an established business, *King* v. *Minneapolis Ry. Co.* (1884) 32 Minn. 224, or special adaptability to a certain business, *Boom Co.* v. *Patterson* (1878) 98 U. S. 403, or proximity to water power; *Maynard* v. *Northampton* (1892) 157 Mass., 218; and in addition, if but part is taken, damages for the remainder. *Matter of The Mayor* (N. Y. 1899) 39 App. Div. 589. Also the plans of a proposed structure, or the unrecorded plat of the land into lots, may be shown to prove the capabilities of the land; *Chicago Ry. Co.* v. *Blake* (1886) 116 Ill. 163; *Ry. Co.* v. *Longworth* (1876) 30 Oh. St. 108; but the intention of the owner as to its future use cannot be shown, as it does not prove its availability at the present time. *Pinckham* v. *Chelmsford* (1872) 109 Mass. 225. On principle, therefore, it would seem that the cross-examination was improper, as the pecuniary condition of the present owner could have no bearing on the availability of the land for the expansion of the factory; but it seems that the present financial condition of the business itself would be relevant, as negativing the need of expansion, and hence the availability of the tract for that use; or it might be admissible as discrediting the witness.

EVIDENCE—PRESUMPTION OF LAW AS EVIDENCE.—The trial court refused to charge that the legal presumption of undue influence was itself a piece of evidence to overcome the counterproof. *Held*, error. *In re Roger's Will* (Vt. 1907) 67 Atl. 726. See NOTES, p. 127.

EVIDENCE—PRIVILEGED COMMUNICATION—EXTENT OF WAIVER.—The plaintiff, having suffered a prior accident, was later injured by the defendant's negligence. She and her physicians testified to the character and treatment of the resulting injuries, but pleaded privilege as to questions touching the consequences of the prior accident. *Held*, such testimony was privileged. *Dambmann* v. *Met. St. Ry. Co.* (1907) 106 N. Y. Supp. 222.

On the authorities the principal case is sound. The privilege affecting disclosures to a physician is waived by the patient's testifying to the details of the communication; *Webb* v. *Met. St. Ry.* (1901) 89 Mo. App. 604; but not by the mere act of becoming a witness; cf. *Hemenway* v. *Smith* (1856) 28 Vt. 21; *Dittenhoffer* v. *State* (1877) 34 Oh. St. 91; contra, *Inhabitants of Woburn* v. *Kenshaw* (1869) 101 Mass. 113; nor by bringing suit, *Smart* v. *Kansas City* (Mo. 1907) 105 S. W. 709, 714, though much is to be said contra. 4 Wigmore, Evid. § 2389. The extent of the waiver depends on the minuteness with which the patient testifies as to the consultations, *Rauh* v. *Verein* (1898) 29 App. Div. 483; *Webb* v. *Met. St. Ry., supra; Hennesey* v. *Kelley* (1901) 55 App. Div. 449; contra, *Green* v. *Town of Nebegamain* (1902) 113 Wis. 508; but see *Powers* v. *Met. St. Ry. Co.* (1905) 105 App. Div. 358. Should the waiver be based on the patient's calling the physician as a witness, *Sovereign Camp* v. *Grandon* (1902) 64 Neb. 34, its extent rests on the scope of his direct examination; *Butler* v. *Man. Ry.* Co. (N. Y. 1893) 30 Abb. N. C. 78; *Miller* v. *Mo. Pac. R. R.* (1891) 105 Mo. 455; except that failure to object to questions on cross-examination may constitute a waiver. *Lissak* v. *Crocker Estate* (1897) 109 Cal. 442. The privilege as to several physicians is not waived by calling one, *Baxter* v. *Cedar Rapids* (1897) 103 Ia. 599; except when all were consulted simultaneously. *Morris* v. *R. R. Co.* (1896) 148 N. Y. 88, 92. The courts have construed the statutes creating the privilege, e. g. N. Y. Code Civ. Pro. § 834, liberally, *Edington* v. *Mutual Life Ins. Co.* (1876) 67 N. Y. 185, although admitting the injustice often

incidental thereto. *Renihan* v. *Dennin* (1886) 103 N. Y. 573. Conceding the policy of the statute, which is questionable, the choice appears to be between regarding the waiver as complete, thus laying open the patient's whole private life, or construing the waiver strictly.

INSURANCE—CONDITION—NOTICE—DELIVERY OF POLICY AFTER ACCIDENT.—After employer's liability insurance, provided for in a covering note without conditions, had gone into effect, but a week before delivery of the policy, an employee was injured. The policy provided for notice; but no notice was given for two months, and then only the day before the employee's death. *Held,* Fletcher Moulton, L. J., dissenting, as the employer neither knew, nor had the opportunity to know of the condition at the time of the accident, he was not bound by it. *In re Coleman's Depositories, Ltd.* [1907] 2 K. B. 798.

Where a policy calls for "immediate" notice it is construed to mean that notice shall be given within a reasonable time according to all the circumstances of the case. *Solomon* v. *Continental Ins. Co.* (1899) 160 N. Y. 595; *Williams* v. *Lancashire Ins. Co.* (1902) 19 Times L. R. 82; *Niagara Ins. Co.* v. *Scannon* (1881) 100 Ill. 644. In at least some of the United States where there are standard policies, when no policy is issued or delivered, if there is no mention of conditions in the application, the usual conditions of the usual policy are presumed to be meant and are binding on the parties. *De Grove* v. *Metropolitan Ins. Co.* (1875) 61 N. Y. 594, 602; *Smith* v. *State Ins. Co.* (1884) 64 Ia. 716; *Home Ins. Co.* v. *Favorite et al.* (1867) 46 Ill. 265, 268. According to this doctrine the employer in the principal case would be effected with notice and be bound to comply with the condition within a reasonable time after the accident. But even if this doctrine is rejected notice should have been given within a reasonable time after delivery of the policy. *Matthews* v. *Am. Ins. Co.* (1897) 154 N. Y. 449; *Bennett et al.* v. *Lycoming Ins. Co.* (1876) 67 N. Y. 274; contra, *Anoka Lumber Co.* v. *Ins. Co.* (1895) 63 Minn. 286. Such conditions if binding are generally held to be conditions precedent to a right to recover on the policy. *Brown* v. *London Ass. Co.* (N. Y. 1886) 40 Hun 101; *Missouri Pac. Ry.* v. *Western Ass. Co.* (1904) 129 Fed. 610. The principal case, therefore, seems unsound.

INSURANCE—MUTUAL BENEFIT SOCIETY—CHANGE OF BENEFICIARY.—A member of a mutual benefit association contracted to appoint the plaintiff his beneficiary and vested in her the possession of the membership certificate containing the provision that the beneficiary might be changed at will. *Held,* these provisions did not apply, as the plaintiff had been appointed beneficiary for a valuable consideration. *Strong* v. *Supreme Lodge K. P.* (N. Y. 1907) 82 N. E. 433.

A beneficiary gratuitously designated, analogous to a legatee, has no standing to complain if the designation be changed; *Hoeft* v. *Supreme Lodge Knights of Honor* (1896) 113 Cal. 91; *Splawn* v. *Chew* (1883) 60 Tex. 532; *Manning* v. *Ancient Order of the United Workingmen* (1887) 86 Ky. 136; but if the beneficiary be appointed for a valuable consideration he acquires vested rights of which he cannot be deprived by a further exercise of the power to appoint. *Smith* v. *Nat'l Ben. Soc.* (1890) 123 N. Y. 85; *Webster* v. *Welch* (N. Y. 1901) 57 App. Div. 558; *Conselyea* v. *Supreme Council* (N. Y. 1896) 3 App. Div. 464. This result has been reached on a balance of equities, cf. *Jory* v. *Supreme Council Amer. Legion of Honor* (1894) 105 Cal. 20, and on the questionable ground of estoppel. *Webster* v. *Welch, supra.* The principal case may also be supported on the ground that membership certificates will be treated as analagous to wills, *Chartrand* v. *Bruce* (1891) 16 Colo. 19; *Thomas* v. *Leake* (1887) 67 Tex. 469, and since a contract to make one his legatee will be enforced, *Bolman* v. *Overall* (1886) 80 Ala. 451; *Nowack* v. *Berger* (1895) 133 Mo. 24, so here an agreement to make one his beneficiary might be similarly treated.

LANDLORD AND TENANT—COVENANT AGAINST ASSIGNMENT—RESERVATION OF RIGHT OF ENTRY.—The defendant lessee under a lease containing a covenant

against assignment executed a lease to a third party of the premises for the same term and on the same conditions as the original lease, but reserving a right of entry for non-payment of rent. *Held*, Ingraham, J., dissenting, this constituted an assignment. *Herzig* v. *Blumenkrohn* (1907) 38 N. Y. Law Jour., No. 63.

Unless the original lessee has left in himself some reversion, *Woodhull* v. *Rosenthal* (1875) 61 N. Y. 382, the instrument constitutes an assignment though in form a sublease. 1 Taylor, Landl. & Ten. § 16. A right of re-entry is not an interest in the land, nor does it imply the reservation of a reversion; *Doe* v. *Bateman* (1818) 2 Barn. & Ald. 168; it is a mere chose in action. *Sexton* v. *C. S. Co.* (1889) 129 Ill. 318. The principal case is, therefore, correctly decided, and is supported by the weight of authority. *Craig* v. *Simmons* (1891) 47 Minn. 189; *Floyd* v. *Cosens* (Pa. 1830) 2 Ashm. 138. *Collins* v. *Hasbrouck* (1874) 56 N. Y. 162, frequently cited contra is distinguishable on its facts. See *Stewart* v. *R. R. Co.* (1886) 102 N. Y. 618.

LANDLORD AND TENANT—LATERAL SUPPORT FOR BUILDINGS—NEW YORK BUILDING CODE.—The defendant, owning two adjoining pieces of property, made an excavation in one which caused the building on the other to collapse. His tenant in the building sued under § 22 of the Building Code for damages. *Held*, the Building Code applied only to adjoining owners and not as between landlord and tenant. *Paltey* v. *Egan* (N. Y. 1907) 38 N. Y. Law Jour., No. 62.

A tenant can sue for injury to the premises either by reason of his occupation, *Austin* v. *Hudson R. R. Co.* (1862) 25 N. Y. 334, or because of his liability for waste; *Attersol* v. *Stevens* (1808) 1 Taunt. 183, 198; *Cook* v. *Champlain Trans. Co.* (N. Y. 1845) 1 Den. 91; but cannot recover for damages to the reversion. *Foley* v. *Wyeth* (Mass. 1861) 2 Allen 131. By analogy it has therefore been held that the Building Code gives a right to a lessee as against a stranger. *Cohen* v. *Simmons* (1892) 21 N. Y. Supp. 385, affd. (1894) 142 N. Y. 671. The tenant, however, has a right also against his landlord. Any act of the landlord which causes the demised premises to be unsafe or impossible of occupancy, *Snow* v. *Pulitzer* (1894) 142 N. Y. 263, amounts to an eviction. 8 COLUMBIA LAW REVIEW 55. For an invasion of possession not amounting to eviction the tenant has an action either on the breach of an express or implied covenant of quiet enjoyment, *Abrams* v. *Watson* (1877) 59 Ala. 524, or, if a mere wrongful entry, in trespass *quare clausum*. *Dickinson* v. *Goodspeed* (Mass. 1851) 8 Cush. 119; *Avery* v. *Dougherty* (1885) 102 Ind. 443. A proper construction of the ordinance in the light of the common law would thus seem to afford a remedy as between landlord and tenant.

MUNICIPAL CORPORATIONS—ENCROACHMENTS ON STREET—ESTOPPEL.—Plats for a city addition were filed in 1853. Thereafter steel mills encroaching on the streets of this addition were erected. During forty years the City stood by, while the proprietors expended large sums, believing the streets to have been abandoned. *Held*, the City was estopped from treating the buildings as obstructions. *City of Chicago* v. *Illinois Steel Co.* (Ill. 1907) 82 N. E. 286.

The Statute of Limitations does not run against state agencies, 7 COLUMBIA LAW REVIEW 290, but in some states the doctrine of equitable estoppel may be invoked. *Corey* v. *City of Ft. Dodge* (1902) 118 Ia. 742; *Simplot* v. *Ry. Co.* (1883) 16 Fed. 361. The latter principle is not applied to the state, *People* v. *Brown* (1873) 67 Ill. 435; *State* v. *Bevers* (1882) 86 N. C. 588, nor to a municipal corporation in its governmental capacity when the estoppel is sought to be raised from acts of unauthorized agents, *City of Uniontown* v. *Berry* (Ky. 1903) 72 S. W. 295, or ultra vires transactions. *Snyder* v. *Mt. Pulaski* (1898) 176 Ill. 397. Since the city holds title to streets in trust for a public use, *City of New York* v. *Trust Co.* (N. Y. 1905) 104 App. Div. 223, the cases permitting an estoppel must be regarded as anomalous. Dillon, Mun. Corp., 4th Ed. § 667. Furthermore mere silence, unless it implies consent, *Baker* v. *Humphreys* (1879) 101 U. S.

494, will not ground an estoppel. *Ackerman* v. *True* (1903) 175 N. Y. 353. And when the estoppel relates to the title to real property, the party claiming thereunder must have been destitute not only of knowledge of the true state of the title, but also of convenient means of acquiring such knowledge. *Brant* v. *Virginia* (1876) 93 U. S. 326. As the facts of the principal case would not justify an estoppel even as between individuals, the decision seems erroneous.

MUNICIPAL CORPORATIONS—STREETS—CONSTRUCTION OF WALKS.—A strip thirty feet wide was dedicated for ordinary street purposes. The city council had not defined the space in the streets to be used as a carriage way or for sidewalks. The defendant constructed a pavement four feet wide. *Held*, that the city could not restrain its construction. *City of Georgetown* v. *Hambrick* (Ky. 1907) 104 S. W. 997.

Cities have the power to control and regulate streets by ordinance or by-law, *State, Taintor pros.* v. *Mayor etc. of Morristown* (1868) 33 N. J. Law 57; *Commonwealth* v. *Beaver et al.* (1895) 171 Pa. St. 542, subject to the paramount authority of the state, *Southwark R. R. Co.* v. *City of Phila.* (1865) 47 Pa. St. 314, and the purposes of the dedication. *Price et al.* v. *Thompson et al.* (1871) 48 Mo. 361; *Lexington etc. R. R. Co.* v. *Applegate* (Ky. 1839) 8 Dana 289. This power of regulation must be exercised reasonably and is subject to review by the courts. *State* v. *Mayor etc. of Jersey City* (1875) 37 N. J. Law 348. An abutting owner has the right to a reasonable use of the street and is entitled to an injunction against a wrongful appropriation of it, *Shaufele* v. *Doyle* (1890) 86 Cal. 107; *Lexington etc. R. R. Co.* v. *Applegate, supra*, and may make any use of the highway not inconsistent with the public easement or any ordinance. *Allen* v. *Boston* (1893) 159 Mass. 324; *McCarthy* v. *City of Syracuse* (1871) 46 N. Y. 194. The principal case seems sound; but see *Brevoort* v. *Detroit* (1872) 24 Mich. 322.

QUASI-CONTRACTS—LIMITATION OF ACTIONS—NEW PROMISE.—The defendant had fraudulently represented land sold to the plaintiff as unencumbered. Actions in tort and quasi-contract were barred by limitations; but in an action in quasi-contract a written promise to pay made within five years was proved. *Held*, the basis of the action being a tort, the action was barred. *Nelson* v. *Peterson* (Ill. 1907) 82 N. E. 229.

Permitting an acknowledgment of an outlawed indebtedness to toll the statute, though perhaps expedient, Wood, Limitations, 160; but see *Hellings* v. *Shaw* (1817) 7 Taunt. 608, 611, was judicial legislation, *Baillie* v. *Sibbald* (1808) 15 Vesey, Jr. 185; *A'Court* v. *Cross* (1825) 3 Bing. 329, 333, growing out of an aversion to limitations. *Bell* v. *Morrison* (U. S. 1828) 1 Pet. 351. This anomalous doctrine is not confined to strict common law debts, *Gibbons* v. *M'Casland* (1818) 1 B. & Ald. 690; *Wetzell* v. *Bussard* (1826) 11 Wheat. 309, 316; Wood, Limitations, 166, as sometimes stated; *Whitehead* v. *Howard* (1820) 2 Brod. & Bing. 372, 378; though it is restricted to promises to pay a sum of money. *Boydell* v. *Drummond* (1808) 2 Campb. 157. Thus, no admission can revive the right of action for the performance of an act, *Boydell* v. *Drummond, supra;* cf. *Wetzell* v. *Bussard, supra*, or for a tort. *Oothout* v. *Thompson* (N. Y. 1822) 20 Johns. 277; *Peterson* v. *Breitag* (1893) 88 Ia. 418. The best working theory is to regard the new promise, supported by the moral consideration of an antecedent obligation unenforceable by reason of a statutory bar, as the cause of action. *Mills* v. *Wyman* (Mass. 1825) 3 Pick. 207; *Carshore* v. *Huyck* (N. Y. 1849) 6 Barb. 583, 586; Buswell, Limitations, 51. Some authority, *Betton* v. *Cutts* (1840) 11 N. H. 170, supports the suggestion, Wald's Pollock, Contracts, Williston's Ed. 201, 777, that the acknowledgment is only a waiver of the statutory defense, but this has been severely criticized. 16 Harv. L. R. 517; cf. *Dusenbury* v. *Hoyt* (1873) 53 N. Y. 521. The principal case, tested by these general considerations, is logically unsound. The tort itself is distinguishable from the promise implied in law to reimburse; Keener, Quasi-Contracts, 159; *Cooper* v. *Cooper* (1888) 147 Mass. 370; and the decided weight

of authority recognizes that the quasi-contract action may be maintained though the tort action for the same cause is outlawed. *Moses* v. *Taylor* (D. C. 1888) 6 Mackey 255; *Lamb* v. *Clark* (Mass. 1827) 5 Pick. 193; *Hony* v. *Hony* (1824) 1 Sim. & Stu. 568.

QUASI-CONTRACTS—MONEY RECEIVED—TRANSFER OF DEPOSIT.—The defendant by means of a non-negotiable order, drawn by the plaintiff but never delivered by him, wrongfully procured the transfer to her account of the plaintiff's deposit in a savings bank. *Held,* the plaintiff might recover for money had and received. *Earle* v. *Whiting* (Mass. 1907) 82 N. E. 32. See NOTES, p. 125.

REAL PROPERTY—COVENANT AGAINST INCUMBRANCES—RUNNING WITH THE LAND—LIMITATIONS.—The plaintiff was forced to pay a mortgage on property, which he held, through mesne conveyances, from the deceased who had made a covenant against incumbrances, four years after the time for filing claims against the estate had elapsed. *Held,* the covenant ran with the land; and the action was not barred. *In re Hanlin's Estate* (Wis. 1907) 113 N. W. 411.

Since this covenant is *in præsenti,* it is broken when made if there is an incumbrance on the property and, merging in the chose in action cannot, at common law, run with the land. *Thayer* v. *Clemence* (Mass. 1839) 22 Pick. 490; contra, *Myers* v. *Brodbeck* (1885) 110 Pa. St. 198. Yet only nominal damages are recoverable, *Eaton* v. *Lyman* (1872) 30 Wis. 41, until the grantee is forced to pay off the incumbrance, *Wyatt* v. *Dunn* (1887) 93 Mo. 459, or at least until he has done so. *Myers* v. *Brodbeck, supra; Hall* v. *Dean* (1816) 13 Johns. 105. In consequence of this a grantor is practically released from liability, if the eviction does not occur until after a conveyance by the grantee. Many courts have therefore held that this covenant runs with the land by implying an assignment of the chose in action. *Geiszler* v. *DeGraef* (1901) 166 N. Y. 339, or by construing the covenant as one of indemnity. *Richard* v. *Bent* (1871) 59 Ill. 38. The common law rule, *supra,* also worked hardship in that the statute of limitations may have barred the action before any substantial damages could have been recovered. *Chapman* v. *Kimball* (1878) 7 Neb. 399. The theory that the statute does not begin to run until the damages are ascertainable, 19 Am. & Eng. Enc. (2nd Ed.), p. 194, lacks authority. But the same result is reached by construing the covenant, as in the principal case, as a continuing obligation to indemnify. See *Richard* v. *Bent, supra; Myers* v. *Brodbeck, supra.*

REAL PROPERTY—PARTY WALLS—COVENANTS RUNNING WITH THE LAND.—The owners of adjoining lots covenanted that A. might build a party wall, and B. would pay one-half the cost thereof upon user; the agreement to bind heirs and assigns. *Held,* that B.'s successor in title, who used the wall, would be liable on the covenant to A.'s grantee. *Hoffman* v. *Dickson* (Wash. 1907) 92 Pac. 272. See NOTES, p. 121.

STATUTES—INDIANS—JURISDICTION OF STATE COURTS.—A Tuscarora Indian sued in a State court to recover possession of land in the Tuscarora reservation wrongfully seized by the defendant. Jurisdiction was invoked under § 5 of the Indian Law, providing that any demand or right of action, jurisdiction of which is not conferred upon a peacemakers' court, may be prosecuted and enforced in any court of the state. No peacemakers' court existed in that tribe. *Held,* one justice dissenting, the state courts would take jurisdiction. *Peters* v. *Tallchief* (1907) 106 N. Y. Supp. 64.

While refusing of their own initiative to take jurisdiction of the domestic affairs of the Indians, *Dole* v. *Irish* (1848) 2 Barb. 639; *Holland* v. *Pack* (Tenn. 1823) Peck 151, regarding the tribes as dependent nations capable of self-government, see *Worcester* v. *Georgia* (U. S. 1832) 6 Pet. 515, the courts have nevertheless recognized the right of the legislature to extend their jurisdiction, *Dole* v. *Irish, supra; Jimeson* v. *Pierce* (N. Y. 1902) 78 App. Div. 9,

especially when the tribe has become so weak as to be incapable of self-government. McLean, J., in *Worcester* v. *Georgia, supra.* The legislature of New York has extended over the Indians criminal laws, Laws of N. Y. 1822, ch. 204, marriage and divorce laws, Laws of N. Y. 1892, ch. 679, § 3, prescribed the form and duties of peacemakers' courts, ibid. § 47, provided for the enforcement of judgments of the latter in state courts, Laws of N. Y. 1893, ch. 229, § 53, the validity of which legislation has never been doubted. The statute in question, originally enacted for the Seneca Indians at the creation of the peacemakers' court, Laws of N. Y. 1847, ch. 365, § 14, in the revision of 1892 was made a general provision. It must be considered to have been intended to be of general application, Reviser's Note, 3 Rept. Comm. Stat. Rev. 2111, especially in view of the fast diminishing power of the New York tribes, and in accord with the legislature's policy of protection, thus opening the courts to all Indians and not confining the privilege to tribes where a peacemakers' court exists. As noted by the court, the statute does not deprive the Indians of the application of their customary law, nor does it violate any United States treaty rights. *People* v. *Pierce* (1896) 18 Misc. 83.

STATUTES—RAILROADS—REFUSAL OF TRANSFERS.—The plaintiff boarded a car with the sole object of bringing suit, if a transfer were refused him, under N. Y. Railroad Law, § 104, giving "any passenger desiring to make one continuous trip" the right to a transfer and providing that "for every refusal * * * the corporation so refusing shall forfeit fifty dollars to the aggrieved party." On the refusal of a transfer, a second fare was paid and the trip completed. *Held,* Gaynor and Woodward, JJ. dissenting, no recovery could be had. *Bull* v. *N. Y. City Ry. Co.* (1907) 106 N. Y. Supp. 378.

Where a plaintiff, after refusal, does not complete the trip contemplated, no recovery is allowed. *Myers* v. *Brooklyn etc. Co.* (1896) 10 App. Div. 335. Where the trip is, nevertheless, completed some difference of opinion has prevailed, *Topham* v. *Interurban etc. Co.* (1904) 42 Misc. 503, 505; *McLean* v. *Interurban etc. Co.* (1904) 87 N. Y. Supp. 135; *Fitzmartin* v. *N. Y. City Ry. Co.* (1906) 51 Misc. 36, although the weight of controlling authority now denies a recovery under the facts of the principal case. *Nicholson* v. *N. Y. City Ry. Co.* (1907) 118 App. Div. 858; *Kelly* v. *N. Y. City Ry. Co.* (1907) 119 App. Div. 223, 232; *Johnston* v. *N. Y. City Ry. Co.* (1907) 54 Misc. 642; *McCarthy* v. *N. Y. City Ry. Co.* (1907) 55 Misc. 208. On principle, this conclusion is sound. The statute points to a passenger desiring to make one continuous trip as the aggrieved party. Hence one whose intention is to collect the penalty using the trip as a mere means does not come within the statute. *Myers* v. *Brooklyn etc. Co., supra.* This should not, however, be confused with a case where the statutory object is present, and the collection of the penalty is only a motive. *Fitzmartin* v. *N. Y. City Ry. Co., supra.* Under like statutes, similar results have been reached in other Jurisdictions. *Southern Pacific Co.* v. *Robinson* (1901) 132 Cal. 408; *Jolley* v. *Chicago etc. Co.* (1903) 119 Ia. 491. The decision in *Fisher* v. *Railroad Co.* (1871) 46 N. Y. 644, is not contradictory to the principal case, as the section, N. Y. Railroad Law, sec. 39, there interpreted, gives the penalty to any party paying a fare. *Myers* v. *Brooklyn etc. Co., supra; Nicholson* v. *N. Y. City Ry. Co., supra.*

SURETYSHIP—SUBROGATION—RIGHT BEFORE PAYMENT.—The payee brought an action on three of five notes given in payment for land, asking that the land be sold to satisfy the claim. The assignee of the guarantor, who had taken up two of the notes, asked that the proceeds of the sale be applied to the notes held by him. *Held,* that the proceeds would not be applied to all the notes *pro tanto,* but would be applied to the notes taken up by the guarantor, subject to prior satisfaction of those in the hands of the payee. *McClure's Ex'r* v. *King* (Ky. 1907) 104 S. W. 711.

Although a guarantor has an equitable interest in the security for the debt, *Manning* v. *Ferguson* (1897) 103 Ia. 561; *Moore* v. *Topliff* (1883)

107 Ill. 241, he has no right to equitable subrogation *pro tanto* upon part payment, *London etc. Co.* v. *Fitzgerald* (1893) 55 Minn. 71; *Wilcox* v. *Fairhaven Bank* (Mass. 1863) 7 Allen 270, as no right to subrogation arises before full satisfaction of the debt. *Ames* v. *Huse* (1893) 55 Mo. App. 422; *Conwell* v. *McCowan* (1870) 53 Ill. 363. This is because the creditor would thereby be prejudiced, *London etc. Co.* v. *Fitzgerald, supra; Wilcox* v. *Fairhaven Bank, supra,* and where the circumstances are such that he would not be prejudiced, subrogation has been decreed before satisfaction of the debt. *State* v. *Atkins* (1890) 53 Ark. 303. Thus, it may be decreed conditionally upon such satisfaction. *Moore* v. *Topliff, supra; City of Keokuk* v. *Love* (1871) 31 Ia. 119. This result was reached in the principal case.

TORTS—ANIMALS FERAE NATURAE—GAME LAWS.—The defendant killed the plaintiff's dog in order to save a wild deer upon his land during the closed season. *Held,* he was liable for the value of the dog. *Zanotti* v. *Bolles* (Vt. 1907) 67 Atl. 818.

At common law dogs were recognized as property for the purposes of civil, *Wright* v. *Ramscot* (1667) 1 Saund. 84; see, *Warren* v. *State* (Ia. 1848) 1 Green 106, 111, but not for criminal actions. *Case of Swans* (1593) 7 Coke 18 a; *Reg.* v. *Robinson* (1859) 8 Cox C. C. 115. In the United States dogs are generally regarded as property, *State* v. *M'Duffie* (1857) 34 N. H. 523; *Kinsman* v. *State* (1881) 77 Ind. 132, irrespective of their value, *Parker* v. *Mise* (1855) 27 Ala. 480; *Dodson* v. *Mock* (N. C. 1838) 4 Dev. & Batt. 146, and may not be destroyed merely because they are trespassing, *Fenton* v. *Bisel* (1889) 80 Mo. App. 135; *Brent* v. *Kimball* (1871) 60 Ill. 211, but may be killed to prevent destruction of property. *King* v. *Kline* (1847) 6 Pa. St. 318; *Brauer* v. *English* (1886) 21 Mo. App. 490. Animals *ferae naturae* belong to the state, with a qualified right for citizens to obtain property in them, *Geer* v. *Connecticut* (1896) 161 U. S. 519, and therefore it is proper for the state, under its game laws, to prescribe periods within which they may not be killed, *Ex parte Maier* (1894) 103 Cal. 476; *Magner* v. *The People* (1881) 97 Ill. 320; *State* v. *Rodman* (1894) 58 Minn. 393, but this would not necessarily prevent property being acquired by individuals since property may be acquired in other ways than by killing. *Haywood* v. *State* (1883) 41 Ark. 479; *Ulery* v. *Jones* (1876) 81 Ill. 403. In the principal case it did not appear that the deer had been reduced to captivity and as no right to acquire property by killing existed, it would seem that the defendant had no property interest to protect which could justify him in killing the dog. See *Chapman* v. *Decrow* (1899) 93 Me. 378, 388.

TORTS—PUBLIC SERVICE CORPORATIONS—DUTY OF RESPECTFUL TREATMENT.—The plaintiff, as agent for another, presented a telegram to the defendant's operator for transmission, but the latter swore at him heavily, and ordered him to leave the office. This action is brought to recover damages for mental suffering. *Held,* the plaintiff could recover. *Dunn* v. *W. U. Tel. Co.* (Ga. 1907) 59 S. E. 189.

Ordinarily, no action lies for malicious insults; *Broderick* v. *James* (N. Y. 1871) 3 Daly 481; but a duty of respectful treatment has been placed on carriers, *Chamberlain* v. *Chamberlain* (1823) 3 Mason 242, and, perhaps, on innkeepers. Cf. 7 COLUMBIA LAW REVIEW 553. Its extension to all public service corporations seems unjustifiable, as the departure from the general rule in the exceptions above noted is due to the necessity of preventing an abuse of the semi-police power possessed by carrier and innkeeper over passenger and guest. In the cases relied on by the court, *Gasway* v. *Ry. Co.* (1876) 58 Ga. 216; *Ry. Co.* v. *Richmond* (1893) 98 Ga. 495, the insults merely went to increase damages for an assault committed by the carrier; while in the principal case the plaintiff had no interest even in the message the transmission of which was refused.

TORTS—REPLEVIN—CONVERSION BY PLAINTIFF AS A DEFENSE.—The defendant's cash register was delivered to the plaintiff by the former's bailee in

return for one belonging to the plaintiff. The defendant assumed possession of the plaintiff's register. The plaintiff brought replevin. *Held*, he could not recover until he returned the defendant's register. *Freeman* v. *Trummer* (Ore. 1907) 91 Pac. 1077.

The solution of the principal case depends upon the nature of the agreement. If title or any transferable interest in the plaintiff's register vested in the defendant's bailee, or if the latter acted as an unauthorized agent whose act was not ratified, a nonsuit should have followed. *Chambers* v. *Hunt* (N. J. 1841) 3 Har. 339, 343. But if the plaintiff retained title, giving up merely a non-transferable possession; or if the bailee's act as unauthorized agent was not ratified; see *Herd* v. *Bank* (1896) 66 Mo. App. 643; or if the act was a wilful appropriation; then there were separate conversions by the defendant and by the plaintiff. *Galvin* v. *Bacon* (1833) 11 Me. 28; *Breckenridge* v. *McAfee* (1876) 54 Ind. 141. The attitude of the principal case, that the one conversion might defeat a recovery for the other, is unsound, *Blair* v. *Johnson* (1903) 111 Tenn. 111; *Williams* v. *Irby* (1881) 15 S. C. 458; *Moffatt* v. *Van Doren* (N. Y. 1859) 4 Bos. 609, since the fact that the plaintiff had some of the defendant's property tortiously in his possession did not affect the right to the immediate possession of the property described in the complaint. *Lovensohn* v. *Ward* (1872) 45 Cal. 8.

TRUSTS—POWER OF TRUSTEE TO LEASE—REASONABLE TERM.—A deed to trustees in fee, to hold in trust during the lives of the cestuis, gave the trustees power to lease property (unimproved city lots) and power to manage and control it as should seem advisable to them. After the trust period, they were to convey the property to remaindermen in fee. As the only method of securing a reasonable rental, the trustees had made a lease for ninety-nine years, the tenant to build on the land demised. *Held*, the lease would not be sanctioned. *In re Hubbell Trust* (Iowa 1907) 113 N. W. 512. See NOTES, p. 129.

WATERS AND WATERCOURSES—FRANCHISE—RIGHT TO SELL WATER IN MAINS.—The defendant company had run its water mains through the City of Rochester under a franchise to supply suburban towns. *Held*, the defendant's property in the water gave it no right to sell to consumers in Rochester, though sold on their own property in the city. *City of Rochester* v. *Rochester & Lake Ontario Water Co.* (N. Y. 1907) 82 N. E. 154.

This case presents an interesting application of a settled principle which deprives the owner of control over his own property while exercising an easement over another's. Water, although real property in the stream, is personalty when appropriated therefrom. *Heyneman* v. *Blake* (1862) 19 Cal. 579. As its property the company could have sold the water, but it was within the City as property by virtue of a franchise, under which nothing passes by implication, *Charles River Bridge* v. *Warren Bridge* (1837) 11 Pet. 420, 425, and which must be construed strictly against the grantee. *Wabash Ry. Co.* v. *Defiance* (1895) 52 Oh. St. 262, 307. The franchise granted an easement through the City's streets solely for the purpose of transporting the water to other municipalities, and, therefore, selling the water was a misuse of the easement which could be enjoined. Cf. *Howell* v. *King* (1674) 1 Mod. 190; *French* v. *Marstin* (1855) 32 N. H. 316.

WILLS—INTESTACY—ESTATE BY IMPLICATION.—A testator left his residuary estate to A. and B. in fee, but if either should die without issue surviving, her share to go to the survivor. A. died before the testator, leaving issue. *Held*, there was an intestacy as to A.'s share. *Matter of Disney* (1907) 38 N. Y. Law Jour. No. 62.

As A. left issue surviving, B. cannot take her share. And the intestacy rejects necessarily the only remaining legatee, namely, the issue of A., who might take by implication. An implication must not be merely conjectural or probable; *Moone* v. *Heaseman* (1738) Willes 138, 141; it need not be absolutely irresistible, but in some sense unavoidable, as where all circumstances afford an undoubted inference. *Bootle* v. *Blendell* (1815) 19 Ves.

Jr. 494. Where, as in the principal case, the issue is named only in describing the contingency, an intent to give to the issue is not shown, *Ranelegh* v. *Ranelegh* (1849) 12 Beav. 200; *Neighbour* v. *Thurlow* (1860) 28 Beav. 33, whether the parent have an absolute interest, *Cooper* v. *Pitcher* (1845) 4 Hare 485, or only a life interest, *Scalé* v. *Rawlins* [1892] App. Cas. 342, and though it be a residue. *Addison* v. *Busk* (1851) 14 Beav. 459. Where the parent has the absolute, and not a mere life, interest, there is less reason to infer a gift to the issue. 2 Jarman on Wills, 5th Am. Ed., 139. This is hardly true where the legatee in fee has died before the testator, leaving issue; he cannot make provision for them. In case only a life interest is bequeathed, however, the court will imply from slight additional circumstances a gift to the issue. *Kinsella* v. *Caffrey* (1860) 11 Ir. Ch. Rep. 154. The principal case accords with the weight of authority. *Contra, Bentley* v. *Kaufman* (Pa. 1877) 12 Phila. 435.